

THE ADMINISTRATIVE PROCESS. By Glen O. Robinson & Ernest Gellhorn. St. Paul, Minn.: West Publishing Co., 1974. Pp. xxxviii, 928. \$17.50.

*Reviewed by Charles R. McManis**

Courses in administrative law have chronically suffered from a particularly debilitating, though elusive, strain of student and professorial discontent. In some respects, administrative law appears to be one of the more notable victims of the malaise endemic in most second and third year law school courses resulting from the widespread addiction to the case method.¹ In other respects, however, the malaise attending administrative law is unique, for the case method, in addition to being an immensely wasteful and mind-numbing way to approach this subject matter, yields a distorted view of what the subject matter is by focusing on the vapid subject of judicial review of agency proceedings rather than on the administrative process itself.² Although administrative law is increasingly recognized as little more than a metaphorical expression for the variegated practices of individual agencies,³ the three established administrative law casebooks,⁴ persisting in the futile attempt to establish general principles of administrative law,⁵ have ignored the problem.⁶ As a result

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THE FOLLOWING CITATIONS WILL BE USED IN THIS REVIEW:

K. DAVIS, ADMINISTRATIVE LAW: CASE-TEXT-PROBLEMS (6th ed. 1973) [hereinafter cited as K. DAVIS CASEBOOK];

W. GELLHORN & C. BYSE, ADMINISTRATIVE LAW: CASES AND COMMENTS (5th ed. 1970) [hereinafter cited as W. GELLHORN & C. BYSE];

L. JAFFE & N. NATHANSON, ADMINISTRATIVE LAW: CASES AND MATERIALS (3d ed. 1968) [hereinafter cited as L. JAFFE & N. NATHANSON];

G. ROBINSON & E. GELLHORN, THE ADMINISTRATIVE PROCESS (1974) [hereinafter cited as G. ROBINSON & E. GELLHORN].

1. See generally H. PACKER & T. EHRLICH, NEW DIRECTIONS IN LEGAL EDUCATION 32 (1972).

2. See Miller, *Prolegomenon to a Modernized Study of Administrative Law*, 12 J. LEGAL ED. 33, 34 (1959).

3. See, e.g., G. ROBINSON & E. GELLHORN xi.

4. These casebooks are: K. DAVIS; W. GELLHORN & C. BYSE; L. JAFFE & N. NATHANSON.

5. Significantly, two of the authors, Kenneth Culp Davis and Walter Gellhorn, had a hand in the studies and report which ultimately led to the embodiment of the metaphor in the Administrative Procedure Act. See G. ROBINSON & E. GELLHORN 98.

6. Indeed, the solution of one of the casebooks appears to be to solve the problem by omitting reference to it. See Botein, Book Review, 46 N.Y.U.L. REV. 438 n.3

they have been criticized for their common failure to give students a concrete understanding of how an agency operates.⁷ Frustration over this defect in the available materials has proved sufficiently acute that, where it has not resulted in an abandonment of administrative law teaching altogether, it has led to a commendable abandonment of the casebook and case method in favor of experimentation with more individualized approaches to administrative law.⁸ Now, at last, ferment among teachers of administrative law has produced a casebook which likewise dares to experiment.

Robinson and Gellhorn describe their new casebook as departing from the traditional approach to administrative law in two major respects: first, it develops what its authors term the traditional material of administrative law—namely, administrative procedure—within the framework of particular agency practice;⁹ second, the book attempts to redefine the content and character of administrative law by integrating the procedural practices of an agency with the substantive law which gives those practices purpose and direction.¹⁰ Thus, instead of the ritual progression from delegation to judicial review to rulemaking, adjudication, and informal agency action,¹¹ the table of contents tantalizes the reader with the promise that in Part I legal restrictions on administrative agencies will be studied in the context of wage and price controls, while in Part II the role of the government as a business regulator and the administrative processes attendant thereto will be explored through the medium of federal licensing of broadcast facilities and federal regulation of unfair and deceptive trade practices. Also promised is an unconventional detour in Part III out of the mainstream of administrative law and into the wilderness of federal land management, as well as an unconventional

(1971), where it is pointed out that the preface of the latest edition of the Gellhorn and Byse casebook specifically omits from the previous edition's preface a statement which the reviewer calls the most accurate generalization ever made about administrative law: "The American administrative process is a figment of the imagination No man has created it. It cannot be described, because it does not exist." *Id.* Compare W. GELLHORN & C. BYSE xi-xiii with W. GELLHORN & C. BYSE, *ADMINISTRATIVE LAW: CASES AND COMMENTS* ix (4th ed. 1960).

7. Botein, *supra* note 6, at 438.

8. See, e.g., Botein, *Simulation and Roleplaying in Administrative Law*, 26 J. LEGAL ED. 234 (1974).

9. G. ROBINSON & E. GELLHORN xi.

10. *Id.* at xii.

11. Compare K. DAVIS CASEBOOK xxi with W. GELLHORN & C. BYSE xv and L. JAFFE & N. NATHANSON xiii. But see text accompanying note 24 *infra*. See generally Botein, *supra* note 6, at 440, where it is pointed out that though the progression was once considered innovative, see, e.g., Hanslow, Book Review, 14 J. LEGAL ED. 405, 406 (1962), it has by now become commonplace.

approach in Part IV to the mainstream topic of individual rights and freedoms in the administrative process. As if this immersion in the workaday world of administrative agencies were not enough, the authors promise in Part V to look at ultimate issues, such as controlling administrative discretion and the role of the public in the administrative process, and to conclude with a last (gasping) look at administrative problems and prospects for reform.

These are admittedly ambitious objectives for a book of under 850 pages of text. Yet in large measure the authors succeed in delivering the materials they promise, without skimping either on the traditional subjects of administrative law study or on the substantive matters selected for inclusion. Indeed, so rich is the concentration of materials that, if anything, one comes away with the uneasy feeling that no mere mortal is capable of digesting it, to say nothing of making it digestible to others. No doubt in anticipation of those qualms, the authors have prepared an admittedly inelegant teacher's manual offering fast, if not wholly effective, relief for the professor,¹² while for the student they have ingeniously concocted a home remedy consisting of suggested answers to selected note questions appearing in the text.¹³ Problems distributed sporadically throughout the text offer some focus for classroom discussion.

Despite inclusion of these teaching and learning aids, the authors occasionally lose sight of their ultimate objective of synthesizing and developing a framework for understanding the administrative process. As a result, both the organization of the materials and the teaching and learning aids themselves suffer a certain deficiency in focus.

Part I begins with a real-life problem—largely a catalogue of the home accidents that ultimately led to the creation of the Consumer Product Safety Commission—designed to focus attention on possible alternatives to the creation of agencies to deal with such problems. At this early stage in the book, however, students might be unable to visualize how an agency itself would deal with the problem. Moreover, without a more vivid picture of past agency performance than the authors have provided,¹⁴ students may well fail

12. See text accompanying note 30 *infra*.

13. See G. ROBINSON & E. GELLHORN 883 (Appendix B).

14. The authors provide excerpts from two articles by economist Milton Friedman, see G. ROBINSON & E. GELLHORN 15-18, thus foreshadowing the casebook's heavy emphasis on economics. See note 34 *infra* and accompanying text. The Friedman excerpts, however, merely outline the adverse social and economic effect of regulating the drug industry. Thus, no emphasis is placed on the largely political reasons why agencies continue not only to exist but also multiply. See note 16 *infra*.

to appreciate the need to consider other alternatives. To use the balance of the book for that purpose, holding the resolution of the problem in abeyance until the end of the course as the authors apparently intend,¹⁵ may give the book a certain symmetry, but it hardly sharpens the student's perspective at the outset. A more auspicious beginning might have been to pit a "Naderesque" critique of agency performance¹⁶ against a "Posnerian" one¹⁷ in an effort to highlight what may be equally futile efforts to abolish the agencies or to goad them into protecting the public interest more vigorously. This approach would indicate the imperfect conditions under which administrative law will be practiced.

One also wonders why, given the general consensus that the delegation doctrine is now dead and buried,¹⁸ the authors insist on exhuming and examining it in such elaborate detail—particularly as a part of their introduction to administrative law. Admittedly, the chapter on delegation is concerned with more than hot oil and sick chickens,¹⁹ inasmuch as the authors, to their credit, present the delegation doctrine primarily as a literary device to introduce in historical perspective such matters as obtaining judicial review, the Federal Register Act of 1935, the Administrative Procedure Act of 1946, and the Freedom of Information Act of 1966. Admittedly, too, the authors go beyond the abstract issue of delegation to explain the economics behind the delegation of authority to impose economic controls during periods of depression, wartime, and inflation. Yet one wonders if either history or economics is the best point of departure for a course in administrative law.²⁰ Rather, why not begin where the introduction eventually winds up—with the current economic scene and the current issues of delegation? The 1971 challenge to the im-

15. The authors conclude their last look at administrative problems and reforms by asking the student to reconsider problem 1. See G. ROBINSON & E. GELLHORN 841.

16. See J. GOULDEN, *THE SUPER-LAWYERS* 174 (1972), where the author suggests, in a chapter entitled *Ruling the Regulations: Just Who's Doing What to Whom?*, that agencies continue to flourish because they satisfy the popular clamor for government supervision and can be ruled by regulated industry through a combination of a "spider web of restrictive procedural rules," *id.* at 180, *ex parte* contacts, and the shuttle of personnel between industry and agency.

17. See Posner, *The Federal Trade Commission*, 37 U. CHI. L. REV. 47 (1969).

18. See E. GELLHORN, *ADMINISTRATIVE LAW AND PROCESS IN A NUTSHELL* 21 (1972): "[T]o the extent that the delegation doctrine is designed to restrict grants of law-making powers to administrative agencies within discernible standards, it is interesting but not very potent history."

19. See *Panama Ref. Co. v. Ryan*, 293 U.S. 388 (1935); *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935).

20. See also text accompanying note 34 *infra* (economics) and text following note 32 *infra* (history).

sition of wage and price controls²¹ is a far less cumbersome literary device than the entire history of the delegation doctrine for introducing the current permissive approach to delegation and the current economic problem of inflation.²²

The time saved by paring down the delegation materials could be devoted to agency discretion and abuse of authority, which should have constituted the next topic in the book. Though Davis has recanted in the latest edition of his casebook and now follows the orthodox sequence treating delegation, judicial review, rulemaking, adjudication, and only then informal agency action,²³ his original arrangement was perhaps closer to the actual sequence of the administrative process in discussing informal agency action and discretion immediately after the delegation of authority to agencies.²⁴ Likewise, Robinson and Gellhorn, by using the delegation doctrine to introduce such subjects as required record keeping and the role of publicity and informal agency advice in the management of wage and price controls, apparently recognize the interrelationship of delegation and discretion. How much neater it would have then been, however, to progress directly from the section on managing the wage and price freeze to Part V's materials concerning the control of administrative discretion and in that context to consider the subjects that the authors attempted to weave into the discussion of delegation. An obvious theme for such a chapter would be the exercise and abuse of agency discretion in the gathering, withholding, and distribution of information and opinion.²⁵ Indeed, each of the various statutes introduced in historical sequence in the chapter on delegation might more satisfactorily be introduced to the student as examples of attempts to control agency discretion and abuse of authority. Ad-

21. See *Amalgamated Meat Cutters v. Connally*, 337 F. Supp. 737 (D.D.C. 1971).

22. If additional introductory material concerning legal restrictions on administrative agencies is thought needed, it might better be devoted to the closely related and currently more controversial issue of the agencies' own expansive reading of their statutory authority. The material concerned with the FCC's remarkable assertion of jurisdiction over cable television, see *United States v. Southwestern Cable Co.*, 392 U.S. 157 (1968), could be rescued for this purpose from its somewhat awkward position at the end of a later section devoted to substantive policy issues in broadcast regulation.

23. See note 11 *supra*.

24. See K. DAVIS, *ADMINISTRATIVE LAW: CASES-TEXT-PROBLEMS* (1965).

25. Such a theme would be particularly appropriate, not only in view of the significant contributions which the authors themselves have made in these areas, see, e.g., Gellhorn, *Adverse Publicity by Administrative Agencies*, 86 HARV. L. REV. 1380 (1973); Gellhorn, *The Treatment of Confidential Information by the Federal Trade Commission's Pretrial Practices*, 36 U. CHI. L. REV. 113 (1968), but also in view of the recent amendment to the Freedom of Information Act. See Pub. L. No. 93-502 (Nov. 21, 1974), amending 5 U.S.C. § 552 (1970).

mittedly, those portions of Part V concerned with the need for *additional* controls on agency discretion and additional mechanisms for the protection of the public might more appropriately be deferred for consideration until the end of the book or included in a separate seminar,²⁶ but that is no reason for deferring consideration of existing controls and their limitations. Were agency authority and discretion more clearly defined in Part I, the student would be better equipped to focus in Part II on the actual workings of administrative agencies.

Whatever the deficiencies in the materials leading up to it, Part II is clearly a worthy prototype for all future administrative law casebooks. By infusing into the traditional concerns of administrative law the life-giving substantive legal issues which confront two selected agencies, the authors have successfully cured the anemia afflicting courses in administrative law. The first case study looks at how the Federal Communications Commission decides to license broadcast facilities. In contrast with their organization of the succeeding chapter, which thoroughly integrates the procedural and policy issues surrounding the Federal Trade Commission's regulation of deceptive advertising, the authors choose to examine separately the procedural and policy issues involved in broadcast licensing. It could easily have been otherwise, of course.²⁷ As it is, only in the next chapter on the Federal Trade Commission's regulation of deceptive advertising does one fully sense the progression of a particular administrative proceeding from the initial acquisition of information and the discretionary decision to prosecute to the pretrial proceeding, hearings, and the all important but often neglected enforcement phase of the administrative process.²⁸ Nevertheless, the organization of the chapter on

26. See text preceding note 42 *infra*. Robinson and Gellhorn indicate in their preface, G. ROBINSON & E. GELLHORN xv, that Part V is designed for use in an advanced seminar on administrative law.

27. The procedural requirement of comparative hearings on the qualifications of competing applicants, for example, is integrally related to the policy issue of what qualifications are to be considered when making such a comparison. Likewise, the standing of a competitor or members of the public to contest or appeal the grant or renewal of a license on grounds of ruinous economic injury, concentration of ownership, or unbalanced programming leads quite naturally to the substantive issues of economic and program regulation. Indeed, by considering the policy issues in the order suggested by their procedural counterparts, and relocating materials on cable television as previously suggested, the authors would find themselves ending the chapter with the transitional topic of advertising and the fairness doctrine.

28. The authors devote a welcome thirty pages to the enforcement of cease and desist orders and compliance with such orders in the absence of adjudication. See G. ROBINSON & E. GELLHORN 501-28. The Davis and Gellhorn & Byse casebooks do not touch

broadcast licensing may well be justified pedagogically, for the very reason that it provides an opportunity to consider procedural and policy issues separately before they are integrated in the next chapter.

A more significant shortcoming lurks in the uneven distribution of problems in Part II. These problems are clustered for no apparent reason at two points in each chapter and concentrate on agency investigation and adjudication.²⁹ This concentration leaves almost 100 pages of important text on rulemaking and judicial review with no problems at all. The irregular distribution of problems evidences a fundamental weakness in the book's pedagogical focus. Unfortunately, the teacher's manual, which the authors admit is largely composed of warmed-over teaching notes of a distinctly impressionistic and frequently episodic character,³⁰ provides little direction beyond describing the authors' own teaching methods. Successful though their methods may have been in the classroom, to embody them unaltered in a casebook does not result in a flexible or coherent teaching tool for others. One must as a practical matter either teach the way Robinson and Gellhorn teach or not use their book.³¹

The promised excursion in Part III into federal land management and wilderness preservation contributes to the book's diversity and richness by focusing on the increasingly important interaction between environmental and administrative law. The authors are no doubt correct that land administration has become a central battle ground, largely overlooked by scholars, for many administrative law controversies.³² Nevertheless, one is not wholly convinced in Part III that the authors' treatment of these subjects has succeeded in bringing them into the mainstream of administrative law. The introductory chapter, entirely textual, merely traces the history of federal land management and concludes with a problem which appears more con-

on these matters. Jaffe and Nathanson, to their credit, include a chapter on enforcement. See L. JAFFE & N. NATHANSON 1054.

29. See G. ROBINSON & E. GELLHORN 165-85 (licensing adjudication), 272-309 (policy issues in broadcast regulation), 383-411 (jurisdiction and investigation), 500-28 (the decisional process and advisory opinions).

30. G. ROBINSON & E. GELLHORN, *MANUAL FOR TEACHERS FOR THE ADMINISTRATIVE PROCESS* iii-iv (1974).

31. Whatever the deficiencies of the casebook by that other Gellhorn, it at least has the virtue of flexibility in that it can be used either as a casebook traditionally would be used or as a basis for considering problems, which are provided in abundance in a supplement, or in some combination of the two approaches, as the individual teacher might desire.

32. G. ROBINSON & E. GELLHORN xiv.

cerned with management questions facing a forest supervisor than with legal questions facing an administrative lawyer. The problem's only administrative law issue is the exemption of matters relating to public property and grants from the APA's rulemaking provisions.³³

The text and cases on wilderness preservation more satisfactorily explore the relation between that topic and judicial review of administrative discretion, sovereign immunity, and the standing of members of the public to seek judicial review. However, the concluding material on the National Environmental Policy Act (NEPA), which has had far greater impact on the administrative process than legislation concerned with wilderness preservation or federal land management, is cursory in the extreme. The one problem included in this chapter, though related to NEPA, is primarily concerned with the problem of using cost-benefit analysis in gauging environmental impact. As much as one sympathizes with the authors' effort to inject economics into the study of law, one wonders as a matter of priorities whether the concern should take the precedence that it does in the casebook, particularly in view of the material shunted aside to make room for it.³⁴

Part IV's unconventional approach to individual rights and freedoms in the administrative process arranges the material under functional headings such as occupational licensure, public employment, educational administration, and government largesse, rather than under the traditional heading of the constitutional right to be heard.³⁵ The functional approach not only allows greater freedom for exploring specific substantive issues—which, again, bring the material to life—but also more clearly differentiates those areas of administrative law where the influence of state administrative processes and the intersection of state and federal law are particularly evident. A less salutary result of the functional approach, however, is to fragment the treatment of issues which are common to all of the functions. Indeed, so interrelated is the case law in this area that there is no real reason why any one particular functional grouping should

33. See 5 U.S.C. § 553(a)(2) (1970).

34. It appears, for example, that the authors' interest in the economics of wage and price controls has caused them to defer until Part V of the casebook—and indeed possibly until a later advanced seminar, see note 26 *supra*—the issue of administrative discretion and the role of the public in the administrative process. See text accompanying notes 18-26 *supra*.

35. See K. DAVIS CASEBOOK 258; W. GELLHORN & C. BYSE 486; cf. L. JAFFE & N. NATHANSON 827 (right versus privilege).

come first.³⁶ Occupational licensure is apparently considered first solely because of its "rather ancient lineage."³⁷

Even if none of the functional groupings selected for inclusion is a wholly satisfactory place to begin, however, the materials themselves demonstrate both that the law is not quite so untidy as the authors suggest and that a more satisfactory basis exists for organizing the chapter than mere historical precedence. Because each chapter deals not only with the procedural protection afforded the individual in the administrative process but also with the particular substantive rights protected, a pattern emerges in the material as it exposes what may be termed the twin false dichotomies between rights and privileges on the one hand and personal liberties and property rights on the other.³⁸ At one extreme, as the authors themselves suggest,³⁹ efforts to protect personal liberties of public employees have led to the recent and rapid demise of the right-privilege distinction which for so long classified public employment as a privilege and not as a property right, and thus deprived the public employee of the procedural protection of the due process clause. At the other extreme, even though the opportunity to engage in an occupation has long been regarded as a sufficient property right to merit procedural protection, the "rigidity and senescence" noted by the authors⁴⁰ has set in at least in part because property rights themselves, except for a few recent stirrings,⁴¹ have in this century been relegated to a lowly constitutional status in comparison with the zealous protection afforded personal liberties. Between these extremes falls the protection of individual rights and freedoms in educational administration (where the protection afforded closely resembles that of public employees and is concerned with "personal" rights and freedoms) and in the administration of government largesse (where the protec-

36. The authors dispose of this problem with the observation that the law is particularly untidy in this area and that there is no magic in the selection of the functional groupings or in their order. G. ROBINSON & E. GELLHORN xiv-xv.

37. *Id.* at 603.

38. *Cf. Lynch v. Household Fin. Corp.*, 405 U.S. 538, 552 (1972), where Mr. Justice Stewart speaks of the "false dichotomy" between personal liberties and property rights. The authors devote considerable time exploring that dichotomy in the chapter on occupational licensure. *See* G. ROBINSON & E. GELLHORN 20-24. *See also* TEACHER'S MANUAL, *supra* note 30, at VII-6a to VII-7.

39. *See* G. ROBINSON & E. GELLHORN 657.

40. *Id.* at xiv.

41. *See* note 38 *supra*. As the authors suggest, emerging judicial scrutiny of economic regulation is likely to be guided by the equal protection clause and a concern over possible discrimination in the application of regulatory schemes. *See* TEACHER'S MANUAL, *supra* note 30, at VII-7.

tion of mere statutory entitlements to money resembles that which obtains in occupational licensure). As the foregoing pattern in the materials suggests, an appropriate order in which to consider the functional groupings would thus be public employment, educational administration, government largesse, and finally, occupational licensure. As Part IV stands, however, it is difficult to see how the student can wholly appreciate the exposé of the false dichotomy between personal freedoms and property rights in the chapter on occupational licensure, without having first studied cases in succeeding chapters which illustrate the zealous protection afforded personal freedoms.

Quite apart from the organization of Part IV, the appropriateness of focusing solely on constitutional protections is debatable. As it stands, Part IV could equally as well have been used for a chapter in a constitutional law casebook. Although existing constitutional law casebooks woefully neglect the subject of procedural due process, one might well ask to what extent an administrative law course should absorb the cast-off materials of more robust courses such as constitutional law, without considering methods other than the Constitution for protecting individuals involved in the administrative process. Again, a better approach might be to look at the actual process by which individual public employees, students, welfare recipients, cab drivers, doctors, lawyers, or even today's Indian chiefs go about either seeking assistance or protecting themselves against interference by administrative agencies. Indeed, such an approach need not be so one-sided as to view these proceedings solely from the perspective of the individual applicant or grievant. From the administrator's point of view the question here, as in Part III, is essentially one of management—albeit the management of human as opposed to natural resources. Focusing on a social security hearing or a civil service grievance proceeding from the administrator's perspective would forge a link between Parts III and IV. As those parts would then be concerned primarily with executive agency processes, they would, in turn, provide a contrast with Part II, which concentrates on the processes of independent agencies. Such an approach in Part IV would also serve to introduce Part V's consideration of the need for consumer advocates, ombudsmen, and other protectors of the individual.

As it began, the casebook ends with a look at administrative problems and prospects for reform. This last chapter gives the book the symmetry that the authors were trying to achieve and provides an opportunity for a brief examination of some less sweeping propos-

als for reform. About these proposals the authors remain prudently skeptical, however, questioning the value of talking about specific reforms when there are nagging doubts that current regulatory schemes serve any valid public purpose.⁴² It would indeed appear that until such time as the legislative branch of government gives serious consideration to abolishing agencies whose service to the public is questionable,⁴³ the most important contributions to administrative law will not be the structural reforms proposed by panels of experts and scholars but the persistent demands by practicing lawyers—and administrators themselves⁴⁴—for deregulation where regulation is no longer necessary and for broader representation where valid public purposes can still be served.

Reform of the administrative process, depending as it does on lawyers with an understanding of how agencies actually operate, presupposes reform in the teaching of administrative law. Robinson and Gellhorn have made valuable contributions to reform in both areas in the publication of their casebook. While *The Administrative Process* may not yet be honed to perfection as a teaching tool, it contains the prescription for curing the malaise which has long afflicted courses in administrative law.

42. G. ROBINSON & E. GELLHORN 840.

43. Cf. Washington Post, Feb. 5, 1975, at A7, col. 1, reporting proposals by the Ford administration for substantial reductions of federal regulation in the transportation, natural gas, and financial industries.

44. See BROADCASTING, Oct. 21, 1974, at 23, reporting that Commissioner Glenn O. Robinson, one of the casebook authors and now a member of the Federal Communications Commission, has called for deregulation of cable television.

